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Supreme Court, U.S.
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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

In re JACK G. NORTON, ~~Relator~~ Petitioner

v.

~~THE HONORABLE DON WITTIG,~~
~~Respondent~~

ORIGINAL PETITION FOR MANDAMUS AND/OR PROHIBITION DIRECTED TO RESPONDENT AS JUDGE OF THE 125TH JUDICIAL DISTRICT COURT OF HARRIS COUNTY, TEXAS

PETITION FOR MANDAMUS AND/OR PROHIBITION

DONALD J. WILLY
DONALD J. WILLY & ASSOCIATES
5251 Westheimer, Suite 830
Houston, Texas 77056
(713) 667-1700

Counsel of Record for Relator

Alpha Law Brief Co., Inc. — 8748 Westpark — Houston, Texas 77063 — 789-2000

32 pp

QUESTION PRESENTED

May a state court employ discovery abuse sanctions to effectively deny Relator's use of the adjudicatory process because of discovery misconduct by another party, over which Relator has no control?

LIST OF PARTIES AND STATUS

Gildo A. Michelletti, M.D.	Plaintiff
Michael J. Walters, LPT	Plaintiff
Jack G. Norton	Defendant
Doug Russell Chevrolet, Inc.	Defendant
Douglas C. Russell	Defendant
Andrew C. Brown, Esq.	Attorney for Defendants Russell and Doug Russell Chevrolet

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PETITION FOR MANDAMUS AND/OR PROHIBITION

OPINIONS BELOW

The opinions of the Court of Appeals for the First Supreme Judicial District of Texas and the Supreme Court of Texas are not reported. They are appended to this Petition.

Respondent's Order, entered as judge of the 125th Judicial District Court of Harris County, Texas, and objected to herein, is appended to this Petition.

JURISDICTION

The Supreme Court has jurisdiction of this matter pursuant to 28 U.S.C.S. § 1651.

CONSTITUTIONAL PROVISIONS AND RULES OF COURT INVOLVED

Relator contends that the actions of Respondent violated the Fifth and Fourteenth Amendments to the United States Constitution, the text of which is:

Amendment V.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV.

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Relator contends that the applicable provisions of the Texas Rules of Civil Procedure are Rules 166b, 167, and 215, the excerpted portions of which are as follows:

Texas Rule of Civil Procedure 166b.

b. Documents and Tangible Things. A party may obtain discovery of the existence, description, nature, custody, condition, location and contents of any and all documents, (including papers, books, accounts, drawings, graphs, charts, photographs, electronic or videotape recordings, and any other data compilations from which information can be obtained and translated, if necessary, by the person from whom production is sought, into reasonably usable form) and any other tagible things which constitute or contain matters relevant to the subject matter in the action. A person is not required to produce a document or tangible thing unless it is within the person's possession, custody or control. Possession, custody or control includes constructive possession such that the person need not have actual physical possession. As long as the person has a superior right to compel the production from a third party (including an agency, authority or representative), the person has possession, custody or control.

Texas Rule of Civil Procedure 167

1. Procedure. Any party may serve on any other party a REQUEST:

d. The party upon whom the REQUEST is served shall serve a written RESPONSE which shall state, with respect to each item or category of items, that inspection or other requested action will be permitted as requested, and he shall thereafter comply with the REQUEST, except only to the extent that he makes objections in writing to particular

items, or categories of items, stating specific reasons why such discovery should not be allowed.

e. All parties to the action shall be served with copies of each REQUEST and RESPONSE.

f. A party who produces documents for inspection shall produce them as they are kept in the usual course of business, or shall organize and label them to correspond with the categories in the request.

Texas Rule of Civil Procedure 215

1. Motion for Sanctions or Order Compelling Discovery.

b. Motion.

(2) if a party, or other deponent, or a person designated to testify on behalf of a party or other deponent fails:

(c) to serve a written response to a request for inspection submitted under Rule 167, after proper service of the request; or

(d) to respond that discovery will be permitted as requested or fails to permit discovery as requested in response to a request for inspection submitted under Rule 167;

the discovering party may move for an order compelling a designation, an appearance, an answer or answers, or inspection or production in accordance with the request, or apply to the court in which the action is pending for the imposition of any sanction authorized by paragraph 2b herein without the necessity of first having obtained a court order compelling such discovery.

2. Failure to Comply with Order or Discovery Request.

b. Sanctions by Court in Which Action is Pending. If a party or an officer, director, or managing agent of a party or a person designated under Rules 200-2b, 201-4 or 208 to testify on behalf of a party fails to comply with proper discovery requests or to obey an order to provide or permit discovery, including an order made under paragraph 1 of this rule or Rule 167a, the court in which the action is pending may, after notice and hearing, make such orders in regard to the failure as are just, and among others the following:

(1) An order disallowing any further discovery of any kind or of a particular kind by the disobedient party;

(2) An order charging all or any portion of the expenses of discovery or taxable court costs or both against the disobedient party of the attorney advising him;

(3) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(4) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(5) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing with or without prejudice the action or proceedings or any part thereof, or rendering a judgment by default against the disobedient party;

(6) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt

of court the failure to obey any orders except an order to submit to a physical or mental examination;

(7) When a party has failed to comply with an order under Rule 167a(a) requiring him to appear or produce another for examination, such orders as are listed in paragraphs (1), (2), (3), (4) or (5) of this subdivision, unless the person failing to comply shows that he is unable to appear or to produce such person for examination.

(8) In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order of the attorney advising him, or both, to pay, at such time as ordered by the court, the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust. Such an order shall be subject to review on appeal from the final judgment.

STATEMENT OF THE CASE

At issue is whether mandamus should issue to protect Norton from an objectionable Order [App. p. 1a], issued August 30, 1989, by the Honorable Don Wittig, Respondent, a judge of the 125th Judicial District Court of Harris County, Texas, sanctioning the failure to produce during discovery, "Missing Documents" in the possession of Doug Russell Chevrolet, Inc. and Douglas C. Russell, co-defendants. Norton has neither actual nor constructive possession of such documents. The sanctions deny Norton's use of established adjudicatory procedures, effectively abrogating his right to be heard in defense of the claims against him and in assertion of his own cross and counterclaims. Under *Hammond Packing Co.*

v. Arkansas, 212 U.S. 322 (1909), and subsequent cases, Respondent's order is a denial of due process under the Fourteenth Amendment. Mandamus is an appropriate remedy because the objectionable Order effectively prejudices trial on the merits,[1] and appeal does not remedy the clear abuse of discretion in sanctioning a party for another's wrongdoing.[2] The issue before this Court, whether to permit discovery sanctions to determine the outcome of litigation where the sanction is imposed against a party who cannot comply with the objectionable Order, is most serious and merits consideration by mandamus.[3]

The purported basis for sanctioning Norton is his greater right to possession[4] of Company books and records, expressed by his "greater knowledge of the Company's books and records than any other person and [he] could have controlled the proper disposition, retention,

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1. *Moore v. Sims,* 442 U.S. 415, at 432 (1979). Review of discovery abuse by mandamus is limited to gross abuse of discretion by the trial court. *Douglas Oil Co. v. Petrol Stops Northwest,* 441 U.S. 211 at 232 (1979).

2. Mandamus is appropriate in discovery controversies where the issue is confining the trial court to lawful exercise of its prescribed jurisdiction. *Schlagenhauf v. Holder,* 379 U.S. 104 (1964). *Hammond* engenders a Constitutional deprivation of power, dehabilitating trial judges sanctioning of a party because of conduct attributable to another party.

3. See, as representative examples, *Reproductive Services, Inc. v. Walker,* 439 U.S. 1307 (1978); *Schlagenhauf v. Holder,* 379 U.S. 104 (1964).

4. While Respondent found Norton had a greater right to possess the documents, his Master finds at paragraph 1.8 of the Master's Report that "Defendants Company and Russell have had, at all times pertinent to this action, care, custody and control of the Company's books and records." When a party under the court's jurisdiction has actual possession, why sanction another party without possession under the theory of constructive possession?

and storage of the Missing Documents". Nefariously, Respondent's objectionable Order is not based upon Norton's failure to produce documents he has or controls, but instead upon his personal knowledge of the information contained in Company books and records which are in the actual possession of another party. Norton neither has actual possession, nor any "superior right to compel production from a third party"[5] so as to imply constructive possession of the Missing Documents.[6]

Nonetheless, Respondent orders Norton to produce Missing Documents which are not in his actual custody or possession, when they are, or appear to be, in the actual possession, custody and control of an adverse party in the same lawsuit. It is respectfully submitted that if Respondent cannot force the Company as actual custodian to produce these documents, neither can Norton.[7]

Respondent not only orders Norton to produce Missing Documents which are in the actual possession of another party, but also requires him to somehow cause that other party to pay monetary sanctions once the documents are produced. Payment of these monetary sanctions by the

5. Texas Rule of Civil Procedure 166b(2)(b).

6. Norton ~~is not~~ currently an officer, director, nor employee of the Company, nor was he when made a party or when discovery was commenced upon him. He is not for the Company, nor is the Company his agency, authority, or representative, nor has he any other right to require that the Company do his bidding.

7. Norton is represented by separate counsel. Norton filed crossclaims against Doug Russell Chevrolet for contribution and indemnity, and to collect on a note owed Norton by the Company. Some of the documents stricken prove the validity of this debt, and Respondent has prohibited Norton from independent proof of his crossclaims.

co-defendants is a prerequisite to Norton's employing documents and testimony in his defense.[8]

The relevant facts are that on July 29, 1987, Gil Michelletti ("Michelletti") filed suit[9] against Doug Russell ("Russell") and Doug Russell Chevrolet, Inc. (the "Company"). On June 13, 1988, Mike Walters ("Walters") intervened as a plaintiff. Michelletti and Walters are the real parties in interest in this matter, and respectively are represented by Harriet Hubacker, Esq. and James Mahan, Esq. Douglas Russell and Doug Russell Chevrolet are represented by Andrew Brown, Esq. Andrew Brown, who was sanctioned as counsel to Russell and the Company is represented by George A. Rustay, Esq.

During the course of this litigation, the Company was sold, (June 21, 1988) and its business records placed in storage (July, 1988) under the custody and control of

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8. Respondent's Order also goes beyond merely requiring Norton to produce documents in the possession of another and adverse party. It compels Norton to produce an accounting. Under Texas procedure, Norton cannot be compelled to create a document to satisfy the discovery needs of adverse parties. As noted in *Flores v. The Fourth Court of Appeals*, No. C-7815, Supreme Court of Texas, June 28, 1989, the only exception to this general rule is expert reports (which is not applicable here): "A request for production of reports of experts, however, must seek an actual document in existence because a party will not be compelled to create or construct it for his opponent". 2 R. McDonald, *Texas Civil Practice*, ¶ 10.03 (rev. 1982).

9. Two minority shareholders (Michelletti - 5%) (Walters - 20%) of a holding company, which owns a note payable by the owner of Doug Russell Chevrolet (DRC), are claiming mismanagement and fraud in the operation of DRC. In response to plaintiffs discovery, DRC elected to produce business records as maintained in the normal course of business—they're stored in the back of the shop of the new owner. Counsel for plaintiffs and their CPA reviewed the records, and sampled. There exists a significant dispute between plaintiffs and DRC as to documents which actually were produced, resulting in several motions and cross-motions for sanctions.

the new owners. Norton resigned as an officer and director. The business operations of the Company substantially terminated, and a receiver was appointed (July 25, 1988 and amended August 31, 1988) to pay remaining debts. Norton was joined as a defendant on July 19, 1988. Norton answered on August 5, 1988, and crossclaimed against the Company, Russell and Walters. First discovery of Norton as a party was conducted by the plaintiffs on September 17, 1988,[10] and on about April 10, 1989, Plaintiffs requested[11] that Norton produce Company business records. Norton responded that he did not have possession, custody, or control of such records. On April 24, 1989, (amended May 16, 1989) the Receiver was appointed to the additional post of Special Master ("Master") for discovery matters, and he conducted a hearing on June 16, 1989, and evidentiary hearings on July 7, 1989, and July 17, 1989. On May 1, 1989, based upon the recommendation of his Master, Respondent ordered that an informal list of documents requested jointly of all defendants be redelivered, and treated as a formal document request. Norton complied with this "formal request" on May 3, 1989, in accordance with T. R. Civ. P. 167(1)(d) listing documents he produced by category requested, and indicated that various Company records were not in his possession, custody or control. On May 22, 1989, Respondent ordered all "defendants" to account in writing and under oath

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10. Norton's desposition was taken August 11, 1987, but at this time he was not a party. The only record inquiry at this deposition was for the Corporate Minute Book, which Norton testified was in the possession of Buddy Gregory, Esq., another stockholder.

11. By a document request attached to his notice of deposition.

for missing Company documents.[12] Norton took exception to this Order because it classed Norton with the Company as one holding a "superior right . . . to compel production of the Missing Documents from a third party." Nonetheless, on May 26, 1989, Norton furnished plaintiffs and Respondent with a detailed affidavit concerning the "Missing Documents", and denying that any were in his possession, custody or control. At Master's hearing on July 7, 1989, Norton again testified that the "Missing Documents" were not in his possession, custody or control. This testimony was not contradicted at hearing. The Master's Report of August 4, 1989 is the document relied upon by the Respondent in entering the objectionable August 30, 1989, Order.

A petition for mandamus was filed September 21, 1989 in the Court of Appeals for the First Supreme Judicial District of Texas, and overruled [App. p. 4a] on September 27, 1989. Thereupon, a petition for mandamus was filed in the Supreme Court of Texas on Sep-

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12. The May 22nd Order provided, in part:

ORDERED, ADJUDGED AND DECREED, that the Plaintiff's Motion is granted, and that Defendants Douglas C. Russell, Doug Russell Chevrolet, Inc., and Jack Norton shall produce the documents identified as Items III.1 through III.14 and IV.1 through IV.3 (the "Missing Documents"), or to account, in writing and under oath, for the absence of such Missing Documents, on or before Friday, May 26, 1989, at 5:00 pm; it is further

ORDERED, ADJUDGED AND DECREED, that each Defendant has a superior right to that of the Plaintiff and Intervenor, to compel production of the Missing Documents from a third party, and a general or conclusory response by any Defendant that the Missing Documents are not in that Defendant's possession, or that the Missing Documents have been delivered by that Defendant, to the extent that such documents exist, will not be acceptable, and will result in the imposition of sanctions as if no response had been timely filed by that Defendant;

. . .

tember 29, 1989, and overruled [App. p. 6a] on the same day.

The objectionable part of the August 29, 1989, Order prohibits Norton (as a "Defendant") from:

(i.) introducing evidence or making any argument that any payment made by a check payable to a bank was a legitimate business expense, unless full voucher copies of the checks are produced.

(ii.) introducing evidence or making any argument that proper disposition was made of the money received from the sale of used cars, unless a full accounting, with complete support from the Company's books and records, is made.

(iii.) introducing any evidence or making any argument concerning his investment in, or assumption of liabilities for, the company, as a basis for recovery of any sum or offset of any liability, unless copies of all Company Ledger Journals for the years 1981 to 1988 are produced.

(iv.) introducing any evidence whatsoever, or making any argument whatsoever, that plaintiffs' expert witness is unable to draw a definitive conclusion concerning any testimony because incomplete records of transactions were provided to him.

Respondent's Order sanctions "all Defendants" without regard to whether the documents are within the actual or constructive possession, custody or control of a specific defendant so that he is able to comply with the requirements of T. R. Civ. P. 167.[13]

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13. It was Norton's duty to object stating the reasons why he should not be required to produce documents. *Hipolito Acevedo*

SUMMARY OF ARGUMENT

The sanction imposed by Respondent effectively throws Norton out of court because he is unable to introduce evidence to disprove the claims of the plaintiffs.[14] The consequences are more than Norton may lose his case before a jury because he is expressly prohibited from introducing exculpatory evidence.[15] without use of excluded evidence and testimony, Norton cannot prove his crossclaim for money loaned Doug Russell Chevrolet, or his claims of contribution and indemnity against Russell and Walters. Under normal circumstances, Norton's evidence and testimony as to various Company expenditures would be probative of his defenses against the plaintiffs' claims. Because of the sanctions imposed, Norton's day in court will be a futile and frustrating exercise.

Limas v. De Delgado, 770 S.W.2d 953 (CA-El Paso, 1989), and in compliance with Respondent's Order of May 1, 1989, Norton stated that with respect to the Missing Documents "none in possession of Jack Norton". Norton continued to object throughout the proceedings. As an example, at hearing on July 7, 1989, Norton testified under oath that the last time he had seen the voucher binders was at the end of July, 1988; he had neither possession, custody nor control, and the Documents were in the storeroom at the successor of Doug Russell Chevrolet.

14. The Plaintiffs' Sixth Amended Petition claims Norton to be a constructive trustee of the assets of Doug Russell Chevrolet. Norton's position as an officer and director may place him in a fiduciary position with respect to stockholders in the Company. Such fiduciary responsibilities include a duty to account for expenditure of Company funds. Under Respondent's Order, Norton is prohibited from accounting for significant portions of Company funds expended in business operations. Consequently, it is expected that Norton will lose on claims against him as a defendant.

15. Any seeming curtailment of the right to trial by jury must be scrutinized carefully. *Beacon Theatres v. Westover,* 359 U.S. 500 (1959). Through his order, Respondent effectively removes issues from jury consideration, and makes them subject to summary determination or by instructed verdict.

Any sanction which effectively throws a party out of court must be an exercise of the *Hammond*[16] presumption, or it is an unconstitutional violation of due process. *Hovey v. Elliott,* 167 U.S. 198 (1897).[17] Sanctioning a party by denial of a full hearing on the merits runs against a definitive Constitutional limit.[18] This Court's interpretation of F. R. Civ. P. 37[19] in *Societe Internationale v. Rogers,* 357 U.S. 197, 212 (1958) held that discovery rules "should not be construed to authorize dismissal because of petitioner's noncompliance with a pretrial production order when it has been established that failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of petitioner." The Fourteenth Amendment makes this logic applicable to

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16. *Hammond Packing Company v. Arkansas,* 212 U.S. 322 (1909). Analysis accepted by *Tate v. Commodore County Mutual Insurance Co.,* 767 S.W.2d 219, 225 (Texas, 1989).

17. *Hammond* establishes a presumption of lack of merit to the contentions of a party evidenced by his failure to obey discovery procedures proscribed by the forum. Thus, the Court's striking of defenses otherwise available to a party must have a basis in the proscribed conduct which is to be sanctioned.

18. Whether the sanction is an exercise of a federal or state procedural rule, and the consequent applicable provision is the Fifth or Fourteenth Amendment, the result is the same. The Constitution protects against abuse of discretion. In any event, the Texas Revisor's note to Texas Rule of Civil Procedure 167 indicates the source to be F. R. Civ. P. 34, and presumably the logic is the same.

19. The Fourteenth Amendment's Due Process Clause has been interpreted as preventing the States from denying potential litigants use of established adjudicatory procedures, when such an action would be the equivalent of denying them an opportunity to be heard upon their claimed rights, *Boddie v. Connecticut,* 401 U.S. 371, 380 (1971); *Logan v. Zimmerman Brush Co., et al.,* 455 U.S. 422 (1982).

the respective States' Rules of Civil Procedure, and precludes use of discovery sanctions as a basis for denial of access to normal judicial channels for conduct which is not the fault of the party.[20] The sanctions imposed against Norton are a de facto dismissal of his claims and defenses to the claims of the plaintiffs.

ARGUMENT

I. SANCTIONING A PARTY FOR CONDUCT NOT RELATED TO HIS WRONGDOING IS A VIOLATION OF DUE PROCESS.

The literature raises a recurring and important issue in interpretation of the *Hovey* and *Societe Internationale* cases applied to orders establishing facts or excluding evidence as sanctions. If these are matters which could *not* be determined on the merits without the evidence which the party has willfully withheld, then the *Hammond* presumption applies. On the other hand, if the sanction forecloses an issue that has insufficient connection with the information that the party has withheld, or the proof

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20. This Court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property, or as plaintiffs attempting to redress grievances. *Societe Internationale v. Rogers,* 357 U.S. 197 (1958) read the property component of the Fifth Amendment to impose constitutional limits upon court's powers, even in aid of their own process, to dismiss without opportunity for a hearing. *Boddie v. Connecticut,* 401 U.S. 371 (1971) implies a Fourteenth Amendment prohibition against denial of access to established adjudicative procedures when this would be the equivalent of a denial of hearing. See *Logan v. Zimmerman Brush Co.,* 455 U.S. 422 at 429-30.

is available through other means, the sanction is regarded as unconstitutional punishment under *Hovey*.[21] [22]

It is the personal conduct of the defendant which must support the imposition of sanctions under *Hammond*, see, for example, *Insurance Corp. v. Compagnie des Bauxites*, 456 U.S. 694, 706 (1981). A proper application of the power to sanction will support a *Hammond* presumption, but if there is an abuse of discretion in the application, there can be no presumption or constructive waiver. Thus, the *Hammond* Court emphasized that the defendant had "not been penalized for a failure to do that which it may not have been in its power to do." *Hammond, supra* at 351; *Societe Internationale*, at 210.

F. R. Civ. P. 37 incorporates the requirements of *Hammond* and auxiliary due process restrictions upon a court's discretion.[23] In order to pass Constitutional muster, Texas Rule 215 must embrace the same standards. Rule 37(b)(2) contains two standards—one general and one specific—that limit a district court's discretion. First, a sanction must be "just"; second, the sanction must be specifically related to the particular "claim" which is at issue and upon which discovery is sought.

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21. A comparative analysis of Federal Rules is provided in Moore's Federal Practice, paragraph 37.03[2.-1], at 37-56. Given the *Societe Internationale* decisions emphasized the level of contumacy as the determinant of the harshness of the sanction, it might be read as a directive that the forum not go beyond the necessities of the situation to foreclose the merits of controversies as punishment for discovery misbehavior.

22. In *Worldwide Anesthesia Associates v. Bryan Anestesia, Inc.*, 765 S.W.2d 445 (CA-14th Houston, 1988), the Court interpreted *Hovey* as based "principally on the notion that a party should not be deprived of his opportunity to defend due to factors unrelated to the merits of his case."

23. See *Insurance Corp. v. Compagnie des Bauxites, supra* at 707.

Respondent's objectionable Order is not "just". If the Order is not rescinded, it permits a former employee who becomes entangled in litigation involving his employer, without any control over his employer's actions, to be sanctioned for the employer's dilatory conduct. Not only is this unfair, it flays against the traditional notions of due process.

Equally improper, Respondent goes beyond the scope of Texas Rules of Civil Procedure 167 and 215[24] by requiring the creation and production of documents which do not exist. The overall effect of these procedures shifts the burden of proof from the plaintiffs to the defendant, and places Norton in the impossible position of defending claims without the use of independently derived testimony and information, otherwise available as evidence. It is hard to conceive that such a trial would meet the requirements of *Boddie v. Connecticut,* 401 U.S. 371, at 377-79. Further, Norton has attempted every means of reconciliation of this issue within the Courts of Texas, and has been refused relief.[25]

Respondent's objectionable Order is not specifically related to the particular claims which Norton seeks to prove either as a defendant or crossclaimant. The sanc-

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24. *Hammond, supra* is apparently the law in Texas. It was cited in *Tate v. Commodore County Mutual Insurance Co.,* 767 S.W.2d 219, 225 (Texas, 1989).

25. See, *Pennzoil Co. v. Texaco, Inc.,* 481 U.S. 1 (1987); *Moore v. Sims,* 442 U.S. 415, at 432 (1979). The Texas Court of Appeals held wrongful imposition of sanctions is subject to review by direct appeal, citing *Central Freight Line, Inc. v. White,* 731 S.W.2d 121 (C.A.-Houston, 14th, 1987), but contra from the same court is *Smith v. White,* 695 S.W.2d 295 (C.A.-Houston, 1st, 1985) and *Zep Manufacturing Co. v. Anthony,* 752 S.W.2d 687 (C.A.-Houston, 1st, 1988).

tions against Norton are not directed at the specific documents which for whatever reason he did not produce.[26] Respondent made no findings of fact, and his Master failed to relate the "Missing Documents" to either the claims against Norton, or Norton's cross and counterclaims against the other parties. Having put the particular matters into issue, it was the plaintiff's burden to produce some documentation of their claims.[27] If they relied upon discovery for that purpose, that the documentation was not produced is entirely the fault of other parties—not Norton.

Instead under the Order, Norton is barred from producing evidence in support of his own positive claims, as a sanction for another parties' non-production of Missing Documents which might prove plaintiffs' case. Thus, the consequence which flows from the imposition of Respondent's sanction is far in excess of expectations as related to the presumption of admission of the want of merit of Norton's assertions. Effectively Norton is not only precluded from defending claims against him, but his own case is lost because he cannot prove the crossclaims.

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26. Although Respondent did not address the matter in his Order, the Master found that Norton had failed to produce personal bank records and stock account records. Report of Master, paragraph 1.1. No sanction was applied for this nonproduction.

27. Texas Rule of Civil Procedure 13 requires that the signatures of attorneys or parties constitute a certificate by them that they have read the pleading . . . ; that to the best of their knowledge, information and belief formed after reasonable inquiry the instrument is not groundless and brought in bad faith or groundless and brought for the purpose of harassment.

II. MANDAMUS IS AN APPROPRIATE REMEDY.

While the First Court of Appeals thought that appeal was an adequate remedy for Norton, it is respectfully submitted that the abuse which this action seeks to remedy deserves mandamus because it is a serious imposition upon Norton's Constitutional right to due process. This Court, as well as the First Court of Appeals has considered such abuse worthy of mandamus in the past, and it is respectfully requested that this Court's discretion work to issue mandamus as requested. The issue presented is an unusual application of sanctions, inattentive to the requirements of due process. If state judges are permitted to arbitrarily sanction a party out of court, for conduct which is not related to the party's participation in the judicial process, it represents a novel and sinister aspect to litigation—not often seen in federal or state court. Such conduct should be specifically disapproved, and mandamus is the best remedy to accomplish this result.

CONCLUSION

The importance of permitting judges discretion in exercise of discovery sanctions must not prevail over the Constitutional requirements that litigants be precluded from presenting their cases to a jury only as a result of discovery abuse which is attributable to them. To permit a judge to sanction a party out of court, without implementation of Constitutional protections guaranteeing due process is an abuse which encourages judicial ineptitude resulting in a lack of conformance with standards of interpretation and consequent unfair and unequal treatment of litigants in state courts.

WHEREFORE, Norton prays that this Court find that the relief as requested herein is appropriate, and Order that Respondent either rescind his August 30, 1989 Order, or that he be stayed from proceeding with the trial of this matter pending a hearing and final disposition of this matter by this Court.

Respectfully submitted,

DONALD J. WILLY
DONALD J. WILLY & ASSOCIATES
5251 Westheimer, Suite 830
Houston, Texas 77056
(713) 667-1700

Counsel of Record for Relator

CERTIFICATE OF SERVICE

I certify that the number required by the Rules of Court of true and correct copies of the foregoing Petition for Writ of Mandamus and/or Prohibition, was hand delivered or sent certified mail, postage prepaid, to all counsel of record, and to Respondent, in this matter, this 3rd day of October, 1989, to wit:

The Honorable Don Wittig
Judge 125th District Court
1019 Congress
Houston, Texas 77002

Harriet Hubacker, Esq.
Counsel for Gil Michelletti
5718 Westheimer, Suite 700
Houston, Texas 77056

James Mahan, Esq.
Counsel for Mike Walters
2001 Kirby Drive, Suite 1008
Houston, Texas 77025

Andrew Brown, Esq.
Counsel for Doug Russell and
Doug Russell Chevrolet
3100 Richmond, Suite 500
Houston, Texas 77098

George A. Rustay
Dow, Cogburn & Friedman
2300 Coastal Tower
Houston, Texas 77046

DONALD J. WILLY

APPENDIX

NO. 87-74381

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
125TH JUDICIAL DISTRICT

GIL MICHELETTI, M.D.,
Plaintiff

MIKE WALTERS,
Intervenor

v.

DOUGLAS C. RUSSELL, et al

ORDER

On this 29th day of August, 1989, came on to be heard the Master's Report of Findings and Recommendations on Plaintiff's and Intervenor's Motions for Sanctions, and the Court having considered the said Report, the previous actions taken by the Court and the portion in this cause as reflected in the Court's file, and the evidence and arguments of counsel, has determined that the recommendations of the Master should be accepted in part and modified in part; it is therefore

ORDERED, ADJUDGED and DECREED, that sanctions pursuant to Rule 215, Texas Rules of Civil Procedure, are imposed against Doug Russell Chevrolet, Inc. (the "Company") and Douglas C. Russell ("Russell"), and their counsel, Andrew C. Brown, jointly and severally, in the amount set forth below. These sanctions are based on a reasonable amount of attorney's fees for

plaintiff and intervenor in preparing all pleadings and briefs and attending hearings by the Master on June 16 and July 7, 1989 on plaintiff's and intervenor's last motion for sanctions and the preparation for and hearing of the Company's and Russell's motion for sanctions heard by the Master July 17, 1989, plus the amount of court reporter's fees for such hearings. The amount of such sanctions shall be $3,252.03 each to plaintiff and intervenor, based on Twenty (20) hours of attorney's time for each party at $150.00 per hour, plus $504.06, being the fees of the Court reporter. The Master's fees and expenses incurred in connection with these hearings shall be taxed as costs by the Court upon final judgment in this cause. The sanctions shall be paid within ten (10) days of this Order. If such sanctions are not timely paid, all pleadings of the Company and Russell in this cause shall be stricken; it is further

ORDERED, ADJUDGED and DECREED, that all Defendants are prohibited from introducing any evidence, or making any argument whatsoever, at the time of trial, that any payment made by a check payable to a bank was a legitimate business expense of the Company, unless within five (5) days of this Order, full voucher copies of all such checks have been provided to plaintiff and intervenor, and the sum of $2,000 is paid by Russell and the Company as additional sanctions in equal shares to plaintiff and intervenor; it is further

ORDERED, ADJUDGED and DECREED, that all Defendants are prohibited from introducing any evidence, or making any argument whatsoever, at the time of trial, that proper disposition was made of the proceeds of the sale of the used car inventory, unless within five (5) days of the entry of this Order, a full accounting, with complete

support from the Company's books and records, of the receipt and disposition of all such sales proceeds is made to plaintiff and intervenor, and the sum of $2,500 is paid by Russell and the Company as additional sanctions in equal shares to plaintiff and intervenor; it is further

ORDERED, ADJUDGED and DECREED, that all Defendants are prohibited at the time of trial from introducing any evidence whatsoever, or making any argument whatsoever, concerning Defendant Jack Norton's investment in, or assumption of liabilities for, the Company, as a basis for recovery of any sum or offset against any liability, unless within five (5) days of the entry of the Order, copies of all Ledger Journals for all years, from 1981 to 1988, are provided to plaintiff and intervenor, and the sum of $2,500 is paid as sanctions in equal shares to plaintiff and intervenor; it is further

ORDERED, ADJUDGED and DECREED, that all Defendants are prohibited at the trial from introducing any evidence whatsoever, or making any argument whatsoever, that plaintiff's and intervenor's expert witness is unable to draw a definitive conclusion concerning any testimony because incomplete records of transactions were provided to or available to him.

SIGNED, this 30th day of August, 1989.

/s/ DON E. WITTIG
Judge Presiding

THE STATE OF TEXAS

OPINION IN THE
COURT OF APPEALS
FOR THE
FIRST DISTRICT OF TEXAS

NO. 01-89-00924-CV

DOUG RUSSELL, Relator

v.

THE HONORABLE DON E. WITTIG, JUDGE OF
THE 125th DISTRICT JUDGE OF
HARRIS COUNTY, TEXAS, Respondent

NO. 01-89-00925-CV

DOUG RUSSELL CHEVROLET, INC., Relator

v.

THE HONORABLE DON E. WITTIG, JUDGE OF
THE 125th DISTRICT JUDGE OF
HARRIS COUNTY, TEXAS Respondent

NO. 01-89-00926-CV

JACK NORTON, Relator

v.

THE HONORABLE DON E. WITTIG, JUDGE OF
THE 125th DISTRICT JUDGE OF
HARRIS COUNTY, TEXAS, Respondent

Original Proceeding on Motion for Leave to File Petition for Writ of Mandamus

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In separate mandamus proceedings, relators Doug Russell, Doug Russell Chevrolet, and Jack G. Norton ask this court to order the respondent trial court to rescind its order imposing sanctions.

Wrongful imposition of sanctions is subject to review by direct appeal after final judgment. This Court has no authority to grant mandamus relief based on the imposition of sanctions. *Central Freight Line, Inc. v. White,* 731 S.W.2d 121 (Tex. App.—Houston [14th Dist.] 1987, orig. proceeding).

The motion for leave to file petition for writ of mandamus is OVERRULED.

PER CURIAM

Panel consists of Justices Warren, Bass, and Dunn.

Do not publish. Tex. R. App. P. 90.

Judgment rendered and opinion delivered
Sept. 27, 1989.

True copy attest:

/s/ KATHRYN COX
Kathryn Cox
Clerk of the Court

ORDERS OF THE SUPREME COURT OF TEXAS
Pronounced September 29, 1989

THE FOLLOWING MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS IS OVERRULED:

C-9098. JACK G. NORTON v. THE HONORABLE DON WITTIG, JUDGE; from HARRIS County; 1st district (01-89-00926-CV, Rule 90, 09-27-89)